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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re V.G. et al., Persons Coming Under the
Juvenile Court Law.

SAN BERNARDINO COUNTY
CHILDREN AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

J.W.,

Defendant and Appellant.

E048419

(Super.Ct.Nos. J226512 & J226513)

OPINION

APPEAL from the Superior Court of San Bernardino County. A. Rex Victor,
Judge. (Retired judge of the San Bernardino Super. Ct. assigned by the Chief Justice
pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Diana W. Prince, under appointment by the Court of Appeal, for Defendant and
Appellant.

Ruth E. Stringer, County Counsel, Dawn Stafford and Jeffrey L. Bryson, Deputy
County Counsel, for Plaintiff and Respondent.

Joanne Willis Newton, under appointment by the Court of Appeal, for Minors.

Defendant and appellant J.W. (Father) appeals from the juvenile court's dispositional order denying him reunification services and visitation as to his two daughters: five-year-old J.G. and four-year-old V.G.¹ On appeal, Father contends the juvenile court erred in denying him reunification services and visitation with his daughters. We reject these contentions and affirm the judgment.

Minors' counsel raises a new issue without first having filed a cross-appeal and argues that the juvenile court failed to comply with the notice requirements of the Indian Child Welfare Act (ICWA). (25 U.S.C. § 1901 et seq.) Father joins in minors' argument.

I

FACTUAL AND PROCEDURAL BACKGROUND

The family came to the attention of the San Bernardino County Children and Family Services (CFS) on March 27, 2009, after then one-year-old M.P. was admitted to the hospital with pneumonia and failure to thrive. Baby A.P. also showed signs of failing to thrive and was admitted to the hospital the following day. While at the hospital, J.G. stated four different times that she was hungry and there was no food in the home. Mother reported that she did not have a ride and, therefore, walked from her home to the hospital with her four young children for three hours. She also stated that she was feeling

¹ Mother is not a party to this appeal. Mother is also the mother of two toddler boys, M.P. and A.P., who likewise are not parties to this appeal.

overwhelmed trying to care for four children under the age of five, and that her mother was planning to help her.

Mother further disclosed that J.G. and V.G. were victims of physical and emotional abuse by Father and were seeing a therapist one time a week. Two years ago, Mother took the girls to stay with Father temporarily while she was recovering from a work-related accident. Father refused to give the girls back and went to court to get custody of the girls so he would not have to pay child support. However, after a very short time of having the girls, Father was unable to care for then one-year-old V.G. V.G. cried constantly, and Father tried to suffocate her on several occasions. He also beat her and “sent her to the hospital.” This was all done in front of V.G.’s older sister J.G. Father also beat Mother unconscious. A medical examination of V.G. revealed that she had “several marks indicating serious physical abuse.” These included a slap mark on her face, significant bruising to her ear and buttocks, multiple abrasions, and petechia under her eyes consistent with suffocation. V.G.’s treating doctor determined that V.G. had “suffered severe non-accidental trauma and [was] at risk of further injury including death if left in the same environment.” J.G. was also examined and observed to have “yellow bruises between her right upper buttocks.” Father was arrested on April 10, 2007, and sent to prison for inflicting corporal injury on a spouse or cohabitant and child endangerment/willful cruelty to a child. Mother was thereafter given custody of the girls and obtained a restraining order against Father.

On April 2, 2009, a petition pursuant to Welfare and Institutions Code² section 300, subdivisions (b) (failure to protect), (e) (severe physical abuse of child under five), and (g) (no provision for support) was filed on behalf of the children. The children were formally removed from parental custody the following day and placed in a suitable foster home.

Mother had been involved in the drug culture for years and had tested positive for methamphetamine and amphetamine on April 3, 2009. She was untruthful about her substance abuse history. In addition, Mother never had a home of her own and was incapable of providing stable housing or basic needs for her children.

The social worker spoke with Father in April 2009. Father claimed to pay child support for his two daughters. He admitted to “spanking” his girls with “an open hand,” and being arrested for abusing his daughter V.G. He explained that he had become frustrated with V.G.’s behavior and spanked her with an open hand. He then covered her mouth with his hands to keep her from crying. He acknowledged that petechia formed in her eyes and that there was bruising on her buttocks. Father was released on parole on April 29, 2008, and has not had any contact with the children. He also has a five-year restraining order against him to protect Mother and the girls from him.

Father has a long history of inflicting serious physical harm upon Mother and the children, especially V.G. In one incident, Father picked up V.G. with his hands around her ribs and squeezed hard, leaving bruises. In another incident, Father flicked V.G.’s

² All further statutory references are to the Welfare and Institutions Code unless otherwise stated.

nose with his fingers and placed his hands over her mouth and nose openings, causing V.G. to turn red. He later placed a blanket over V.G.'s head in an attempt to smother her and began hitting the child on her buttocks. On another occasion, Father struck V.G. on her hands, leaving welts on them. He also pushed or punched her with his balled-up fist, and had told the then one-year-old child that he would break her hand if she touched his CD's or movies. When Mother attempted to intervene, Father threatened to kill her; and once when Mother attempted to stop Father from hitting V.G., Father grabbed Mother's arm and threw her across the room. Mother was dependent on Father; she did not work; she was not permitted to have a key to their home; she did not have access to a telephone; she was isolated from friends and family; and she had to obtain permission from Father to engage in many daily tasks. Mother reported that V.G. was the target child for Father's abuse; that ever since she was born, he had shown little or no interest in her; and that Father had stated that he cannot "stand" V.G.

Father admitted to spanking his children hard to get their attention; and did not believe his actions were abusive as he was disciplined in the same manner. He believed he was a good father. He also admitted to placing his hands over V.G.'s mouth on at least five occasions to quiet her screaming. He further admitted to having anger issues, which he needed to control. Father was kicked out of his home by his parents due to his "bad attitude and temper."

Father also has an extensive criminal history, which includes offenses for torture, willful cruelty to a child, false imprisonment with violence, furnishing marijuana to a minor, and inflicting corporal injury on a spouse or cohabitant.

The social worker recommended that Father be denied reunification services, as well as visitation because it would be detrimental to the safety and well-being of the girls. The social worker also believed that Father would not benefit from reunification services.

On April 29, 2009, the court ordered the parties to attend mediation to address the issues of allegations, disposition, and visitation. The parties settled the allegations, except as to services and visitation for Father.

A pretrial settlement conference was held on May 14, 2009. At that time, the court found the allegations true as alleged in the third amended petition. A contested dispositional hearing was thereafter held. The children were declared dependents of the court, and Mother was provided with reunification services. Following presentation of evidence, including testimony from Father and the social worker, the court denied reunification services to Father pursuant to section 361.5, subdivision (b)(5) and (b)(6). The court also denied visitation to Father, finding it to be unbeneficial to the children. This appeal followed.

II

DISCUSSION

A. *Denial of Reunification Services*

Father contends that the juvenile court abused its discretion in denying him reunification services pursuant to section 361.5, subdivision (b)(5) and (b)(6). We disagree, concluding that substantial evidence supports the juvenile court's determination under section 361.5, subdivision (b)(5) and (b)(6). (*In re Ethan N.* (2004) 122

Cal.App.4th 55, 64 [juvenile dependency orders reviewed under substantial evidence standard].)

Section 361.5, subdivision (a), provides that, when a child is removed from a parent's custody, "the juvenile court shall order the social worker to provide" reunification services to the child and the child's parents or guardian. Section 361.5, subdivision (b), however, provides generally that reunification services may not be offered when the court finds, by clear and convincing evidence, one or more of the conditions enumerated in that subdivision. (*Renee J. v. Superior Court* (2001) 26 Cal.4th 735, 739 (*Renee J.*)). These two provisions further the goal of preserving the family whenever possible while recognizing that it may be fruitless to provide reunification services under certain circumstances. "Once it is determined one of the situations outlined in subdivision (b) applies, the general rule favoring reunification is replaced by a legislative assumption that offering services would be an unwise use of governmental resources." (*In re Baby Boy H.* (1998) 63 Cal.App.4th 470, 478; see also *Renee J.*, at p. 744.)

Section 361.5, subdivision (b)(5), allows the court to deny a parent reunification services if the court finds, by clear and convincing evidence, "[t]hat the child was brought within the jurisdiction of the court under [section 300, subdivision (e),] because of the conduct of that parent" (§ 361.5, subd. (b)(5).) The court may only order services under section 361.5, subdivision (b)(5), if it finds that "services are likely to prevent reabuse . . . or that failure to try reunification will be detrimental to the child because the child is closely and positively attached to that parent." (§ 361.5, subd. (c).)

Under section 361.5, subdivision (b)(6), the court must deny reunification services to a parent when “the child has been adjudicated a dependent pursuant to any subdivision of Section 300 as a result of . . . the infliction of severe physical harm to the child, a sibling, or a half sibling by a parent or guardian, . . . and the court makes a factual finding that it would not benefit the child to pursue reunification services with the offending parent” (See also § 361.5, subd. (h) [list of factors used to determine benefit to child of providing reunification services to offending parent].) The court may order reunification services for a parent of a child adjudicated dependent under section 300, subdivision (b)(6), if the court finds by clear and convincing evidence that reunification is in the best interest of the child. (§ 361.5, subd. (c).)

We affirm an order denying reunification services if the order is supported by substantial evidence. “In making this determination, we must decide if the evidence is reasonable, credible, and of solid value, such that a reasonable trier of fact could find the court’s order was proper based on clear and convincing evidence. [Citation.]” (*Curtis F. v. Superior Court* (2000) 80 Cal.App.4th 470, 474.) The party challenging the ruling of the trial court has the burden to show the evidence is insufficient to support the ruling. (*In re Geoffrey G.* (1979) 98 Cal.App.3d 412, 420.)

Here, the children were adjudicated under section 300, subdivision (e), as well as subdivisions (a) (serious physical harm), (b) (failure to protect), and (j) (abuse of sibling). Substantial evidence supports the court’s findings that Father inflicted severe physical harm to his children, especially V.G. In fact, Father does not contest the jurisdictional finding that V.G. and J.G. came under section 300, subdivision (e). Thus, section 361.5,

subdivision (b)(5) and (b)(6) both apply. The only issues for further review are whether substantial evidence supports the court's findings that services were not likely to prevent reabuse and failure to try reunification would not be detrimental to V.G. and J.G. because they were not closely and positively attached to Father (§ 361.5, subds. (b)(5), (c)), and that it would not benefit the children to pursue reunification services with Father (§ 361.5, subds. (b)(6), (h)).

There is no evidence here that services would likely prevent reabuse or that failure to try reunification would be detrimental to the children. In fact, substantial evidence shows that services would be ineffective at preventing reabuse and detrimental to the children. The record demonstrates that Father was abused by his parents and that his parents kicked him out of their home due to his “bad attitude and temper.” Father was twice convicted of inflicting corporal injury on Mother—in 2002 and 2007. He was also convicted of inflicting severe injury onto V.G. Father said he would hurt V.G. to prove to Mother that she could not stop him. He knew he was out of control and had anger issues, but he still failed to seek medical assistance. He also knew his actions were inappropriate at the time, but he did not think they were as bad as they were until he was in prison. In addition, Father was fine with his discipline style and believed he was a good father and did not believe he was abusive. Moreover, his anger issues were long-standing and were not likely to be resolved with services within 12 months. The record supports the finding that Father was not amenable to services; thus, the court could reasonably determine that services were not likely to prevent reabuse of the children.

The record also demonstrates that there was no bonding between Father and the children. At the time Father was sent to prison for abusing V.G. and Mother, V.G. was one year old and J.G. was two years old. Father had no contact with the girls for over two years. The social worker testified that the children do not “even acknowledge him as dad.” Substantial evidence supports the court’s finding the children were not closely and positively attached to Father and the failure to order reunification services would not be detrimental to them. (§ 361.5, subds. (b)(5), (c).)

In view of the severity of the children’s injuries, especially V.G., the manner in which the children’s injuries were inflicted, the fact there were multiple injuries to the children and the improbability the children would be safely returned to Father’s care within 12 months with no continuing supervision, substantial evidence supports the court’s findings that it would not benefit the children to pursue reunification services with Father. (§ 361.5, subds.(b)(6), (h)(1)-(6).)

When the prerequisites of section 361.5, subdivision (b)(6), are met, the juvenile court “shall not” order reunification services for the offending parent unless it finds, “by clear and convincing evidence, that reunification is in the best interest of the child.”

(§ 361.5, subd. (c).) ““[O]nce it is determined one of the situations outlined in subdivision (b) applies, the general rule favoring reunification is replaced by a legislative assumption that offering services would be an unwise use of governmental resources. [Citation.]” [Citation.] The burden is on the parent to change that assumption and show that reunification would serve the best interests of the child.” (*In re William B.* (2008) 163 Cal.App.4th 1220, 1227.) In determining whether reunification is in the child’s best

interest, the court considers the parent's current efforts, fitness, and history; the seriousness of the problem that led to the dependency; the strength of the parent-child and caretaker-child bonds; and the child's need for stability and continuity. (*Id.* at p. 1228.) A best interest finding requires a likelihood reunification services will succeed—"some 'reasonable basis to conclude' that reunification is possible" (*Id.* at pp. 1228-1229, citing *Renee J.*, *supra*, 26 Cal.4th at p. 1464.)

The record is devoid of evidence that reunification would be in the children's best interest. Father did not believe there was anything wrong with his disciplining style. He was not bonded with the children. Father cruelly and deliberately harmed the children, especially V.G., at such a very young age. Due to their tender ages, even if Father received 18 months of services, the girls would still be too young to protect themselves from Father. The record supports the finding that reunification with Father was not in the children's best interests. (§ 361.5, subds.(b)(6), (c).)

In sum, there is clearly substantial evidence to support the conclusion that section 361.5, subdivision (b)(6), mandated the denial of reunification services to Father. (*In re S.G.* (2003) 112 Cal.App.4th 1254, 1260-1261.)

Contrary to Father's contentions, we conclude that the court properly denied reunification services to Father under section 361.5, subdivision (b)(5) and (b)(6).

B. *Denial of Visitation*

Father also contends that the juvenile court erred in denying him visitation. When a parent is denied reunification services, the determination of whether to permit visitation lies in the dependency court's discretion. (§ 361.5, subd. (f).) "The appropriate test for

abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court.” (*Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478-479; see also *In re Stephanie M.* (1994) 7 Cal.4th 295, 318-319.)

Father argues that there was no evidence to support the finding that visits with the children would be detrimental. But the determination of whether a parent will be allowed visitation when the court does not order reunification services is controlled by section 361.5, subdivision (f), which states, in relevant part, that “[t]he court *may* continue to permit the parent to visit the child unless it finds that visitation would be detrimental to the child.” (Italics added.) Thus, where the parent is not receiving reunification services, a visitation order is not required even in the absence of evidence of detriment.

This distinction is based on the idea that visitation is an essential part of a reunification plan. “In order to maintain ties between the parent or guardian and any siblings and the child, and to provide information relevant to deciding if, and when, to return a child to the custody of his or her parent or guardian, or to encourage or suspend sibling interaction, any order placing a child in foster care, and ordering reunification services, shall provide as follows: [¶] (1)(A) Subject to subparagraph (B), for visitation between the parent or guardian and the child. Visitation shall be as frequent as possible, consistent with the well-being of the child.” (§ 362.1, subd. (a)(1)(A).)

Therefore, when reunification services are being provided, it is error to deny visitation with the parent to whom the services apply unless there is sufficient evidence

that visitation would be detrimental to the child. (*In re Jonathan M.* (1997) 53 Cal.App.4th 1234, 1237, disapproved on other grounds in *In re Zeth S.* (2003) 31 Cal.4th 396, 413-414.)

But visitation is not integral to the overall plan when the parent is not participating in the reunification efforts. This reality is reflected in the permissive language of section 361.5, subdivision (f). In any event, even if the dependency court was required to order visitation in the absence of a finding of detriment, there is sufficient evidence in the record to establish that visitation would be detrimental to the children. The children are very young and there is no evidence to show that they had formed a relationship with Father, or that visitation would benefit them. As the juvenile court found, Father was largely a stranger to the children and there would be no benefit to visitation with him. Although Father had supported the children in the past by providing them with the basic necessities, V.G. and J.G. were one and two years old, respectively, when Father was sent to prison for willfully abusing V.G. and Mother. The children have not seen Father in over two years and do recognize him as a father.

In sum, Father has not established that the dependency court abused its discretion in denying him visitation with the children.

C. ICWA

Without filing a cross-appeal, minors' counsel raises a new issue and argues that the juvenile court failed to comply with the notice and inquiry requirements of the Indian Child Welfare Act (ICWA). (25 U.S.C. § 1901 et seq.) Father joins in minors' argument, but did not raise this issue in either his opening brief or reply brief. It is

undisputed that Father has no Indian heritage and that the Indian ancestry is from Mother's side.

We decline to address the merits of this claim for several reasons. First, a respondent may not challenge a judgment or finding without filing a cross-appeal. (*Estate of Powell* (2000) 83 Cal.App.4th 1434, 1439; *California State Employees' Assn. v. State Personnel Bd.* (1986) 178 Cal.App.3d 372, 382, fn. 7.) Because minors, as respondents, did not file a cross-appeal, the issue is not properly before this court.

Second, the procedural posture of this case is such that any compliance issues with the ICWA can be raised in the court below. It appears that Mother is receiving reunification services for the children. Even if we assume that reunification services as to Mother have been terminated at this point, it appears the case is still pending before the juvenile court. Accordingly, any error pertaining to the ICWA can be remedied in the court below.

III

DISPOSITION

The judgment is affirmed.

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RICHLI
J.

We concur:

RAMIREZ
P. J.

KING
J.